regular basis, the Commission should make clear that special programs -- whether periodic, like the "ABC Afterschool Specials," or one-shot specials, like the "Earth Day" presentation -- can make extremely worthwhile contributions to children's education and development, and that their development and broadcast should be encouraged, rather than deterred.

5. **Short-form Programs.**

The Notice tentatively proposes that short-form programs -- that is, programs of less than half an hour -- should not count toward fulfillment of a licensees' obligation to provide educational and informational programming specifically designed for children, or should be severely discounted or limited in this regard. We strongly oppose this proposal.

From the beginning of its application of the CTA, the Commission has emphasized that short-form programming can make valuable contributions to the education and development of children. For example, in its original Report and Order implementing the Act, the Commission observed that "short segment programming, including vignettes and PSA's, may qualify as specifically designed educational and informational programming for children. Such material is well suited to children's attention spans and can often be locally produced with acceptable production quality." 68 R.R.2d 1615 at ¶25. In its Reconsideration Order, the Commission elaborated on this:

> "[S]hort-segment programming has a place in serving children's educational and informational needs....[S]hort-segment programming can provide programming that children will watch

history, mathematics, and grammar.[20] "Schoolhouse Rock" segments are currently presented twice each Saturday during two of the most popular programs in ABC's children's programming lineup -- at the end of "Fudge" and at the end of "The Bugs Bunny and Tweety Show."

In addition, the network currently airs 15 public service announcements specifically directed to children within each regularly scheduled Saturday morning block of children's programming. These PSA's range in length from 10 seconds to a minute, and come from diverse sources such as the National PTA, the American Heart Association, the Environmental Protection Agency, the American Dental Association, the National Advertising Council Anti-Discrimination Leadership Conference, Partnership for a Drug-Free America, the National Safety Council, and the American Academy of Pediatrics. Their subjects range from ethnic tolerance and environmental issues to bus and bicycle safety, nutrition, and dental hygiene. In the first three quarters of 1995, the ABC Television Network broadcast more than 430 educational and informational PSA's for children.

We do not question the Commission's longstanding view that licensees may not fulfill their programming obligation through short-form programming alone.[21] However, we strongly oppose the Notice's suggestion that short-form programs should be discounted

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[20] See Calvert, S. and Tart, M., "Song versus Verbal Forms for Very Long-Term, Long-Term, and Short-Term Verbatim Recall," Journal of Applied Developmental Psychology, Vol. 14, No. 2 (1993)(citing "Schoolhouse Rock" as highly effective in transmitting educational content to young viewers).

[21] See 69 R.R.2d 1020 at ¶41.

> and local stations can afford to produce....We believe it is in the public interest to encourage stations...to air quality programming that will attract and hold a child audience....'[T]here is widespread agreement within the private and public sectors about the positive aspects and growing use of vignette and other 'interstitial' children's programming.'"

Children's Television Programming, 6 FCC Rcd 5093, 69 R.R.2d 1020 at ¶42 (1991).

As we have stated before in these proceedings,[19] short-form programming can be a highly effective educational vehicle in reaching children of various ages, especially the very young. Short-form vignettes and other segments can have an impact far greater than their relatively brief duration. They appeal to the attention span of children, particularly young children. They present a concise, focused message about a particular subject or area. And they stand out from the surrounding programming, which can be of a more general entertainment nature and thereby perhaps deliver a greater audience than might some other educational or informational programming.

As a particularly noteworthy example, we want to cite again "ABC Schoolhouse Rock," our acclaimed series of three-minute segments that have captivated and educated child audiences on the ABC Television Network in the 1970's, 1980's, and 1990's. With a clever mix of song, rhythm, and rhyme, the segments have taught several generations of children valuable lessons in science,

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[19] See Capital Cities/ABC NOI Comments at 4.

entirely or given reduced credit. The Notice states that the Commission "do[es] not wish to give broadcasters a disincentive to air educational short segments that provide helpful information or respond to local needs." Notice at ¶42. Yet that is precisely what the Notice's tentative proposal would do.

In its Notice of Inquiry, the Commission suggested that short-segment programming might be given only limited credit because it is not as readily located by parents as is regularly scheduled programming listed in TV Guide and other services. NOI at ¶8. Many short-form segments, however, recur each week at the same time within the same program. "ABC Schoolhouse Rock," for example, is presented each Saturday by the ABC Television Network at 10:26 a.m. and 11:56 a.m. NYT. Parents and children can plan their viewing so as to see these educational segments twice each week.

Other short-form segments and PSA's are scheduled on a less regular basis. This does not, however, deprive them of their educational value. Indeed, the viewership and impact of the various PSA's and other educational and informational messages are enhanced because they appear embodied within other children's programs. Sometimes those programs specifically complement the PSA's message (e.g., environmental PSA's from the Environmental Protection Agency aired by ABC within the program "Free Willy"). At other times, the messages benefit from the increased audience delivered by the entertainment-oriented show within which they appear (e.g., PSA's from the Partnership for a Drug Free America which ABC airs during various programs, including "The Bugs Bunny and Tweety Show"). In

either case, the PSA's and vignettes provide a distinctly informative and effective message to young viewers across the country. The Commission should continue to recognize the value of these short-form programs and PSA's by permitting licensees to gain full (though not exclusive) credit for them toward satisfying their children's programming obligation.

6. On-Air Icons and Publicizing of Programs.

We have discussed these proposals above. As we stated, we oppose the mandating of on-air icons and agree that broadcasters should be encouraged (although not required) to provide information to listing services.

7. Assessing community needs.

The Notice proposes doing away with the permissive guidelines that the Commission has previously said broadcasters may take into account in assessing and serving the needs of children in their community and fulfilling their obligations under the Act. These factors include (1) the composition of the child audience; (2) programming on the station which, though not directed primarily to children, nevertheless serves their interests and needs;(3) other broadcast programming available to children in the broadcaster's community; and (4) non-broadcast programming (e.g., cable) available to children in the community. Children's Television Programming, 68 R.R.2d 1615 at ¶22. As the Commission has previously observed,

consideration of these factors is an important element in providing broadcasters the programming and scheduling flexibility envisioned by the Act. Id. They do not displace the obligation of each licensee to air some programming specifically designed for children's educational and informational needs. Id. at ¶23. Rather, they serve the public by permitting broadcasters to counter-program -- that is, to present children's programming that appeals to different age groups, airs at different times, or deals with different subject areas than programming presented by other broadcasters or cable programmers in the community. See 136 Cong. Rec. S10275 (July 23, 1990)(remarks of Senator Burns)("Stations will be able to take into account what other children's programming is available in their community in determining their own programming mix."). In this way, the guidelines can lead to greater availability and variety of children's programs in the marketplace, a greater dispersion of children's programming across different time periods, and enhanced service to the community. Rather than eliminating these guidelines, the Commission should reaffirm their applicability and their importance.

V. The Commission Should Not Adopt Quantitative Children's Programming Standards, Either as a Mandatory Requirement or as a Processing Guideline.

ABC strongly opposes the adoption of a quantitative standard for the amount of children's programming aired by each broadcaster, whether in the form of mandatory requirements or "safe harbor"

processing guidelines. Either option, we believe, contravenes the legislative purpose, intrudes too deeply into broadcaster discretion, and has not been proven necessary to make available to our nation's children a broad variety of educational and informational television programming.

1. Quantitative Standards Are Inconsistent with the Legislative History of the Act.

The legislative history of the Children's Television Act demonstrates that Congress did not intend for the Commission to establish specific goals, standards, or requirements for the number of hours of children's programming a station should or must broadcast during a given period. Indeed, quantitative standards are contrary to the express legislative purpose to provide broadcasters with broad flexibility in implementing the objectives of the Act, and the legislative understanding that such flexibility was of great importance in allowing broadcasters to achieve creativity, variety, and quality -- not merely quantity -- in the children's programming they develop and present.

Both the House and the Senate Committee reports on the children's television legislation made clear that the Commission should not "interpret [the Act] as requiring or mandating a quantification standard governing the amount of children's educational and informational programming that a broadcast licensee

must broadcast to pass a license renewal review."[22] While, as the Notice observes,[23] the Reports do not expressly preclude the adoption of a numerical standard, both they and the floor remarks of the legislation's sponsors are filled with indications that such standards were not deemed necessary or appropriate.

Thus, for example, both committee Reports speak of the need for each licensee to present "some" programming specifically designed for children -- not a numerical or percentage minimum, but "some." House Report at 17; Senate Report at 23. Both Reports make clear that licensees may also rely in part on general family programming to fulfill their obligations under the Act, and, notably, both reports emphasize that "[t]he appropriate mix" of child-specific and general family programming was to be "left to the discretion of the broadcaster." Id. In exercising this discretion, broadcasters were expected -- indeed, encouraged -- to consider the specific needs of children and families in their community and the contributions of other broadcasters. Id. And they were also encouraged to consider, as another way of contributing toward their service obligation, "nonbroadcast efforts...which enhance the educational and informational value of [their] programming" and "special efforts...to produce or support [children's] programming broadcast by another station in the licenses's marketplace." Section 103(b) of

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[22] H.R. Rep. No. 385, 1st Sess. 17 (1989) ("House Report"); Senate Report at 23

[23] Notice at ¶54.

the Act, 47 U.S.C. §303b(b).

In all these ways, the Act's language, structure, and legislative history demonstrate a desire to grant broadcasters maximum latitude in developing ways to fulfill children's educational and informational needs, rather than strait jacketing them with precise numerical formulas. In the words of Senator Inouye, Senate floor manager of the legislation:

> "We have left the licensee the greatest possible flexibility in how it discharges its public service obligation to children. We recognize that there is a great variety of ways to serve this unique audience...The list can be extended as far as the imagination of the creative broadcaster." [24]

Reviewing this record, the Commission concluded in 1991:

> "The Act imposes no quantitative standards and the legislative history suggests that Congress meant that no minimum amount criterion be imposed. Given this strong legislative direction, and the latitude afforded broadcasters in fulfilling the programming requirement, we believe that the amount of 'specifically designed' programming necessary to comply with the Act's requirement is likely to vary according to other circumstances, including but not limited to, type of programming aired and other nonbroadcast efforts made by the station."[25]

The Commission therefore rejected suggestions that it adopt

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[24] 136 Cong. Rec. S10121 (July 19, 1990). See also id. At S10127 (remarks of Senator Wirth) ("Of course, it is to be expected that the FCC, in evaluating the licensee's compliance with this provision, will defer to the licensee's judgement to determine how to serve the educational and informational needs of children in its community.").

[25] Report and Order, 6 FCC Rcd at 2115.

quantitative programming standards. Id. On reconsideration, the Commission reaffirmed this conclusion: "[S]uch guidelines...conflict with Congressional intent not to establish minimum criteria that would limit broadcasters' programming discretion."[26]

2. The Commission Has Repeatedly Rejected Quantitative Standards for Children's Programming.

Both prior to and since passage of the Children's Television Act, the Commission has repeatedly declined to establish numerical quotas or guidelines for broadcasters' presentation of children's programming.

In 1960, for example, the Commission included children's programming in its list of 14 programming categories "usually necessary to meet the public interest, needs and desires of the community." Programming Policy, 20 R.R. 1901, 1913 (1960). The Commission provided no quantitative requirements or standards for any categories, however, emphasizing that the categories "do not serve and are not intended as a rigid mold or fixed formula for station operation." Id. Specific programming decisions about how best to serve particular elements of the community, the Commission said, must be left to the "honest and prudent judgments" of the individual broadcaster; "[i]ndeed, any other course would tend to substitute the judgment of the Commission for that of the

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[26] Reconsideration Order at ¶40.

licensee....The Commission's role as a practical matter, let alone a legal matter, cannot be one of program dictation or program supervision." Id. at 1914, 1908.

In 1974, after an extensive inquiry, the Commission rejected a proposal that it mandate minimum amounts of children's programming by each broadcast station. Children's Television Report and Policy Statement, 50 F.C.C.2d 1, 31 R.R.2d 1228 (1974). While concluding that each broadcaster has an obligation to provide some programming for children, the Commission stated that quantitative standards were not an appropriate step:

> "While we are convinced that television must provide programs for children, and that a reasonable part of this programming should be educational in nature, we do not believe that it is necessary for the Commission to prescribe by rule the number of hours per week to be carried in each category....[W]e are involved in a sensitive area, and we feel that it is wise to avoid detailed governmental supervision of programming whenever possible."

Id. at ¶19. On reconsideration, the Commission reaffirmed its decision "to avoid rules which would specify numbers of hours to be devoted to children's programming":

> "In our view, the adoption of rules would involve the government too deeply in program content questions, which raise serious constitutional problems....[Moreover,] because the considerations as to what constitutes 'reasonable amount' [of children's programming] may vary, according to service area demographics, existing children's programming, market size, network affiliation or independent status, prior commitments to locally-produced programs, and the availability of talent, etc., we believe it is desirable to avoid rules which are unnecessarily broad and inflexible."

55 F.C.C.2d 691, 34 R.R.2d 1703 at ¶6 (1975). On appeal, the D.C. Circuit affirmed the Commission's conclusion that "the significant first amendment and policy problems that inhere in regulation of programming" militated against adoption of numerical standards, which the court agreed would constitute a "substantial government intrusion into areas in which, for good reasons, licensees traditionally have exercised considerable discretion." Action for Children's Television v. FCC, 564 F.2d 458, 480, 481 (D.C. Cir, 1977).[27]

In 1984, the Commission revisited the subject, after another lengthy investigation. Again, the agency concluded that numerical standards for children's programming were inappropriate, unnecessary, and constitutionally suspect. Children's Television Programming, 96 F.C.C.2d 634, 55 R.R.2d 199 (1984). Again, that determination was upheld by the D.C. Circuit. Action for Children's Television v. FCC, 756 F.2d 899 (D.C. Cir. 1985)(per curiam).

As noted above, Congress, in enacting the Children's Television Act of 1990, made clear that numerical standards were not viewed as necessary to achieve the objectives of the Act. In its report implementing the Act and on reconsideration, the Commission again

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[27] See also Washington Association for Television and Children v. FCC, 712 F.2d 677 (D.C. Cir. 1983)(affirming Commission's refusal to hold license renewal hearing on petitioner's claim that licensees had failed to provide weekday children's programming).

rejected the imposition of such standards on the grounds of legislative purpose and policy.[28]

The Commission's repeated rejection of quantitative standards for children's programming is consistent with its traditional aversion to numerical quotas for specific program categories. As the Commission has observed, "[p]rogram quota systems have been viewed historically as fundamentally in conflict with the statutory scheme of broadcast regulation." Children's Television Programming, 96 F.C.C.2d 634, 55 R.R.2d 199 (1984) at ¶36. In enacting the Radio Act of 1927, Congress rejected proposals to require broadcasters to allocate set percentages of time to particular program categories, instead enacting a provision expressly prohibiting the agency from "censorship" of broadcast content.[29] In setting the television allocation tables in 1952, the Commission itself rejected a suggestion that commercial broadcasters be compelled to devote specified amount amounts of time to educational programming.[30] The Commission has pointed out that both Congress and the agency have repeatedly rejected proposals for program category quotas and have never "found it desirable from a policy perspective or acceptable

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[28] Children's Television Programming, 68 R.R.2d 1615, aff'd on recon., 69 R.R.2d 1020 (1991).

[29] See FCC v. WNCN Listeners Guild, 450 U.S. 582, 597 (1981).

[30] 41 FCC 148, 1 RR Part 3 (1952) at ¶49 ("A proper determination as to the appropriate amount of time to be set aside is subject to so many different and complex factors, difficult to determine in advance, that the possibility of such a rule is most questionable.")

from a legal perspective to define by hours, schedule, and type any particular programming that should be broadcast to fulfill the public obligations of licensees."[31] Even when it has undertaken to impose affirmative content obligations, the Commission has done so in a way that preserved broad licensee discretion and avoided precise numerical standards, consistently stressing its intention to avoid unnecessary restrictions on programming choices.[32] As the

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[31] Children's Television Programming, 55 R.R.2d 199, at ¶38.

[32] See, e.g., Report on Editorializing, 13 F.C.C. 1246, 1 R.R. Pt. 3 (1949)(broadcasters must devote "reasonable" amount of air time to discussion of public issues); Programming Policy Statement, 44 F.C.C.2d 2303 (1960)(listing general areas of programming "usually necessary to meet the public interest, needs and desires of the community"); Primer on Ascertainment of Community Problems, 27 F.C.C.2d 650, 21 R.R.2d 1507 (1971)(must present some programming responsive to community issues); Fairness Report, 48 F.C.C.2d 1, 30 R.R.2d 1261 (1974) at ¶43 (emphasizing that fairness doctrine obligation is to present "reasonable" opportunity for opposing views, and rejecting strict mathematical formula as "much too mechanical" and "far from reasonable"); On the Airing of Public Service Announcements, 81 F.C.C.2d 346, 48 R.R.2d 563 (1980).

One limited and short-lived exception to the Commission's historic aversion to quantitative quotas was its establishment in the mid-1970's of non-mandatory processing guidelines that provided recommended percentage programming minimums for nonentertainment programming and for "promise versus performance." 43 F.C.C.2d 638, 640 (1973); 59 F.C.C.2d 491 (1976). Both, however, left substantially more to broadcaster discretion than would a numerical standard in this proceeding. "Nonentertainment programming" is a far broader category than educational, child-specific programming, encompassing all news, public affairs, and informational programs without regard to content, style, audience, or impact. The "promise versus performance" percentages measured broadcasters' programming against their own discretionary anticipated program quantities, and did not seek themselves to impose specific programming quantities. Even these broadly defined and highly discretionary guidelines were ultimately deemed by the Commission to intrude

Commission stated in declining to adopt quantitative standards for various program categories in comparative renewal proceedings, in language that fully applies to the type of numerical standards suggested in the Notice:

> "[W]e have no illusions that quantitative standards would be other than an encroachment on the broad discretion licensees now have to broadcast the programs they believe best serve their audiences. . . . [W]e are not convinced that the government should impose on broadcasters a national standard of performance in place of independent programming decisions attuned to the particular needs of the communities served."[33]

3. Numerical Standards Would Infringe Significantly and Unnecessarily on Broadcasters' Programming Discretion, Are Not Desirable from a Policy Viewpoint, and Would Raise Substantial Constitutional Questions.

As discussed above, both the Commission and the courts have repeatedly noted that quantitative standards for children's programming would raise significant constitutional issues because of their intrusion into broadcaster discretion about program content and scheduling. Those decisions have also rejected such standards on policy grounds, finding them both unnecessary and problematic in terms of their actual impact. The current record does nothing to

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excessively into broadcaster programming choices. Deregulation of Radio, 84 F.C.C.2d 968, 49 R.R.2d 1 (1981), aff'd in rel. part sub nom., UCC v. FCC, 707 F.2d 1413 (D.C.Cir. 1983); Deregulation of Television, 98 F.C.C.2d 1076, 56 R.R.2d 1005 (1984).

[33] Standards for Substantial Program Service, 66 F.C.C.2d 419, 40 R.R.2d 763 at ¶¶ 16, 20 (1977), aff'd sub nom. National Black Media Coalition v. FCC, 589 F.2d 578 (1978).

alleviate these concerns or to establish either the need for, or the wisdom of, such an unprecedented intrusion into broadcaster discretion.

(a) The Constitutional Standard

The Notice suggests that a numerical standard for children's programming would be judged by the courts under the relatively relaxed standard for regulations affecting speech that are not content-based but content-neutral, citing the decision in Turner Broadcasting, Inc. V. FCC, 114 S.Ct. 2445 (1994). Turner, however, does not in fact support the Notice position. In Turner, the Court upheld the constitutionality of the must-carry rules precisely because they are content-neutral -- that is, "they impose burdens and impose benefits without reference to the content of speech," id. at 2460; advance a governmental purpose "unrelated to the content of expression," id. at 2461, and do not seek "to promote speech of a particular content" or to "penalize...programmers because of the content of their programming." Id. at 2461-62.

In sharp contrast, an obligation to carry particular amounts of educational programming specifically designed for children focuses directly and explicitly on the programming's content and type, seeking to promote particular content and penalizing broadcasters who present insufficient quantities of that type of programming. It is plainly and unavoidably content-based, content-specific, and

content-intrusive.

The Commission also suggests that a numerical standard for children's programming should be evaluated under the less rigorous standard of Red Lion Broadcasting v. FCC, 395 U.S. 367 (1969). As the Commission recognizes, however, the continuing validity of the "scarcity rationale" which underlay the Red Lion has been widely questioned in various fora, including the D.C. Circuit and the Commission itself, in light of the vast expansion of broadcast, cable, and other communications outlets since 1969.[34] Even under the framework of Red Lion, however, this content-based regulation would pass muster only if it could be shown to be "'narrowly tailored to further a substantial government interest.'" Notice at ¶34 (quoting FCC v. League of Women Voters, 468 U.S. 364, 380 (1984)). As we have noted, the Commission and the courts have repeatedly acknowledged that quantitative standards in the children's programming sphere would raise significant First Amendment issues under the Red Lion standard.[35] We believe that,

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[34] See, e.g., TRAC v. FCC, 801 F.2d 501, 508-09 (D.C. Cir. 1986), cert. denied, 482 U.S. 919 (1987); Syracuse Peace Council v. FCC, 867 F.2d 654, 673-88 (D.C. Cir. 1989)(Starr, J., concurring); Syracuse Peace Council, 2 FCC Rcd 5043 (1987). See also FCC v. League of Women Voters, 468 U.S. 364, 379 n.12 (1984).

[35] The fairness doctrine and personal attack rule affirmed in Red Lion did not impose any strict numerical standard of programming on broadcasters, but required only that they present some programming on controversial public issues; the "reasonable" opportunity for the presentation of opposing views on those issues; and, under the personal attack rule, a "reasonable" opportunity for the attacked individual to respond. See, e.g., Fairness Report, 48 F.C.C.2d 1, 30 R.R.2d 1261 (1974), aff'd sub

under either standard, the Commission would be unable to justify its imposition of quantitative standards for children's programming, for the following reasons.

(b) Congress Did Not Consider Quantitative Standards Necessary or Appropriate.

As discussed above, and as the Commission has repeatedly observed, Congress in adopting the Act concluded that the government's interest in promoting children's educational programs did not require the imposition of quantitative standards; indeed, as the Commission itself has repeatedly observed, such standards are inconsistent with the legislative history of the Act. It would be difficult indeed to justify the need for such an intrusion on broadcaster programming choice which Congress itself considered unnecessary when it adopted the legislation just five years ago.

(c) The Record Since Adoption of the Act Does Not Justify a More Restrictive Approach.

The Notice suggests disappointment in the increase in the levels of children's programming since 1990. As we have discussed above, we believe this reaction is unduly negative. It is at odds,

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nom. NCCB v. FCC, 567 F.2d 1095 (D.C. Cir.1977), cert. denied, 436 U.S. 926 (1978)(stressing that broad deference is to be accorded licensee judgments about, inter alia, programming quantity in applying fairness doctrine obligations).

for example, with the results of the NAB survey, which found that stations on average had doubled their educational and informational programming for children between 1990 and 1994. It also conflicts with other evidence that unprecedented and increasing amounts of educational materials are being made available to children in a wide variety of means -- not only from commercial broadcasters, but also through public television, cable channels, videocassettes, and computer software.

That the rate of increase in commercial television has not been even greater should not be taken as a sign that drastic government intervention in the form of quotas is now necessary. As the Commission has repeatedly recognized, the development, production, and scheduling of these programs takes time. It is not at all surprising that increases to date have been incremental, rather than instantaneous. See NOI at footnote 11. The new NAB survey shows that this trend is continuing, and accelerating.

As discussed below, we do not oppose a further period of Commission monitoring of broadcaster performance in the development and presentation of children's programming. We are confident, however, that such monitoring will demonstrate continued growth and vitality in the area, and the continued lack of justification for government quotas.

(d) Quantitative Standards Could Well Disserve, Rather Than

Promote, Children's Interests.

As the Commission itself has recognized, the adoption of quantitative requirements or guidelines could well have a damaging, rather than encouraging, impact on the variety and quality of children's television, in a number of ways.

First, a focus on the quantity of programming may come at the expense of quality. The Commission has previously observed in the context of children's television that "[p]rogram quotas, in the absence of an extraordinarily complicated allocation mechanism, would work fundamentally against efforts to align commercial incentives with quality service to the child audience." Children's Television Programming, 55 R.R.2d 199 at ¶42. The Commission explained that "rules that require or reward quantity create a strong bias to follow the 'more programs [at] lower cost' approach," which "does not appear to be a public interest maximizing approach" because of its likely impact on program quality. Id. at ¶41. In other words, quantitative standards may well force or encourage stations to spread resources broadly over a number of shows, diminishing the quality of individual productions in the interest of satisfying the numerical quota.[36] One program with a generous production budget may better serve children than two or three

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[36] See also, e.g., Standards for Substantial Program Service, 40 R.R.2d 763 at ¶16 (quantitative program standards may well lead stations "through choice or necessity...[to] spread their resources thinner, and reduce the quality and value of such programming").

meagerly supported programs, and the overall effect of a quota system may well be a diminution in quality, innovation, and service.

Ironically, too, a standard might have the effect of putting a cap on the amount of children's programming and ultimately lead to fewer programs than might otherwise be presented. The Commission itself recognized this possibility in its Reconsideration Order:

> "[Numerical] guidelines would tend to make compliance overly rigid, as broadcasters seek to meet the criteria in order to insulate themselves from further review...[B]y providing safe harbors, such guidelines might well have the unintended effect of acting as a ceiling on the amount of educational and informational programming broadcasters air."[37]

Quantitative standards could also encourage broadcasters to curtail efforts to serve children through general family programming, short-form segments, PSA's, specials, and non-programming efforts for which they would receive at best only limited credit toward fulfillment of those standards. As discussed above, Congress and the Commission have recognized that all of these efforts are highly valuable and complement regularly scheduled, long-form programs for children programming in worthwhile ways. Again, by pushing broadcasters toward recurring long-form programs that count more heavily toward fulfillment of a quantitative standard, such standards would curtail broadcasters' ability and willingness to present the kinds and formats of educational programs that they judge best able to capture the minds and imaginations of

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[37] Reconsideration Order at ¶40.

young viewers.

Quantitative standards would also encroach deeply on broadcaster's scheduling discretion, with possible adverse effect. A requirement that every station broadcast specified amounts of educational children's programs each day, or each weekday, would inhibit the natural counter-programming and scheduling diversity that has occurred within the marketplace, as independent and Fox stations focus their children's programming on weekdays and other network affiliates present the bulk of their programming in Saturday blocks. Even a broader weekly measurement may serve as a constraint on experimentation with monthly or periodic shows and specials.

The key to successful service of children's needs is not to air an arbitrarily selected number of hours of educational television, or to force broadcasters to value the length of a children's program over its quality. Instead, it is the development, production, scheduling, promotion, and presentation of high quality, engaging, and creative programs of various shapes and sizes that draw and retain the interest of a significant child audience and the advertiser support that audience can deliver.

4. An Approach Based on Ratings Points Would Not Cure the Defects of Quantitative Standards.

The Notice suggests that to provide an incentive for quality programming, quantitative programming standards might be based on ratings points. Notice at ¶64. This approach, however, would not

remedy the problems inherent in quantitative standards and, indeed, would in certain respects exacerbate them.

First, as the Commission well knows, ratings and quality are not necessarily synonymous. Encouraging children's shows with the highest ratings is surely not the most effective way to maximize quality or educational and informational service to children.

Second, ratings are notoriously unpredictable and capricious. A high quality program may fare poorly in the ratings despite a generous budget and the broadcaster's best intentions. A ratings success one month may be a failure the next. Broadcasters' compliance with government regulation should not be dependent on the vicissitudes of their programs' performance in the marketplace.

5. "Safe Harbor" Processing Guidelines Would in Practice Be As Intrusive as Mandatory Requirements.

The Notice suggests that numerical standards would be less intrusive, and more appealing to broadcasters, if they were established not as mandatory minimums, but as "safe harbor" guidelines. Broadcasters who air the designated "safe harbor" amount of qualifying children's programming would automatically receive staff approval of their programming performance. Broadcasters who present less than the "safe harbor" amount would be forced to make a special supplemental showing of worthy performance, before the Commission itself, before they could be found in compliance with the Act.

While not as rigid as mandatory requirements, processing

guidelines share the same essential defects, and we oppose them as well.

First, processing guidelines such as the sort proposed in the Notice are not merely friendly programming suggestions. They are governmentally established standards which reward broadcasters for compliance and punish them for noncompliance. True, the punishment does not necessarily preclude an ultimate finding of overall compliance with the Act. But it clearly subjects the broadcaster to hardship: the costs and burdens of proceeding with further review, and the necessity to go to the Commission, rather than obtaining staff approval. It is a content-based regulation, which favors some broadcasters and disfavors others purely on the basis of their program content.

For this reason, a processing guideline is likely to become, for virtually all broadcasters, a de facto minimum. Few broadcasters will choose to undergo extra levels of review, and risk a finding of noncompliance, for failure to meet the safe harbor standard.

As a coercive and de facto numerical standard, the safe harbor suffers from the same defects and raises the same concerns as a firm minimum mandate. Indeed, it was just these sorts of issues that led the Commission to eliminate its short-lived processing guidelines for nonentertainment programming. Deregulation of Commercial Television, 56 R.R.2d 1005 (1984); Deregulation of Commercial Radio, 53 R.R.2d 1 (1981). Although those guidelines involved the far more

broadly defined program category of "nonentertainment," and were thus substantially less intrusive than the very program-specific standards in question here, the Commission nevertheless concluded that they constituted an undue infringement of editorial discretion and First Amendment interests;[38] that they could compromise broadcaster service to the community by encouraging them to focus narrowly on programming quantity, rather than quality;[39] and that they failed adequately to take into account the specific conditions and needs of individual broadcasters and their communities.[40]

The Notice and some commenters suggest that the establishment of "safe harbor" guidelines would assist broadcasters by providing greater certainty and easing administrative burdens for those who meet the designated standard, and that they would constitute a less intrusive and subjective regulatory approach than the current loosely defined standard. See Notice at ¶¶49, 72. As the Commission itself has recognized, however, numerical standards of this nature, despite their apparent promise of greater certainty, in reality offer little administrative benefit, since questions about

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[38] Television Deregulation at ¶27 and n.45.

[39] Id. at ¶27 ("[Our] concerns with the First Amendment are exacerbated by the lack of a direct nexus between a quantitative approach and licensee performance."); id. at ¶29 (broadcasters may not best serve their communities "by the presentation of mere quantities of specific programming").

[40] Radio Deregulation at ¶34 ("[W]e do not believe it is advisable or necessary to specify precise quantities of programming that should be presented by all stations regardless of local needs and conditions.").